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No. 88-1512

In The

Supreme Court of the United States

October Term, 1988

ALBERT J. FERENS and
MARGARET L. FERENS, his wife,

Petitioners,

vs

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether a district court to which a case has been transferred pursuant to 28 U.S.C. §1404(a) is obligated to apply the state law that would have been applied if there had been no transfer where the transfer is from a court having proper venue and jurisdiction and the transfer has occurred as the result of an unopposed motion by the plaintiff.

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

I. The Legislative Background Of Section 1404(a) Supports The View That It Was Not Designed To Defeat The State-Law Advantages Accruing From The Exercise Of A Plaintiff's Venue Privilege

Although acknowledging that the legislative history of 28 U.S.C. §1404(a) does not directly address the question of which state's law should be applied following a transfer, the Respondent claims support for its position in the Reviser's Note following Section 1404. The Note indicates that Section 1404(a) "was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper." Arguing that a *forum non conveniens* dismissal necessarily resulted in a change in the applicable law when the case was refiled in the more convenient forum, the Respondent concludes that to be "in accordance" with the doctrine of *forum non conveniens*, Section 1404(a) must also require a change in the applicable law. These contentions are without merit.

This Court has repeatedly recognized that Section 1404(a) was not a codification of the common law doctrine of *forum non conveniens*, but was intended to be a revision thereof. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981); *Norwood v. Kirkpatrick*, 349 U.S. 29, 31-32 (1955).

> The *forum non conveniens* doctrine is quite different from Section 1404(a). . . .[Section 1404(a)'s] words should be considered for what they say, not with preconceived limitations derived from the *forum non conveniens* doctrine.

Norwood v. Kirkpatrick, 349 U.S. at 31, quoting with approval from *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010, 1011 (3rd Cir. 1952).

Indeed, this Court has specifically stated that Section 1404(a) was drafted, at least in part, to provide relief from the harsh effects of a dismissal under the doctrine of *forum non conveniens*. *Hoffman v. Blaski*, 363 U.S. 335, 335-336 (1960). To the extent that the dismissal of a case on *forum non conveniens* grounds resulted in the action's being barred in the subsequent forum, this would be one of the harsh effects of dismissal which Congress sought to eliminate.

> [The *forum non conveniens*] doctrine involves the dismissal of a case. . . . It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404(a) avoids this latter danger.

Norwood v. Kirkpatrick, 349 U.S. at 31, quoting with approval from *All States Freight, Inc. v. Modarelli*, 196 F.2d at 1011. Contrary to the Respondent's contentions, Section 1404(a) was not intended to be a codification of the doctrine of *forum non conveniens*, but was intended instead to alleviate the harsh effects of a dismissal thereunder.

However, even assuming *arguendo* that Section 1404(a) was a mere codification of the doctrine, it does not necessarily follow that a change in the applicable law is required in order to keep Section 1404(a) transfers "in accordance" with the doctrine of *forum non conveniens*.

Courts in many states, including Mississippi, have required the waiver of an applicable statute of limitations defense available in another state before they will dismiss a case properly brought in their own court.

> [T]here is one classic instance when the doctrine of forum non conveniens will never be applied, and that is to dismiss a case if it is barred elsewhere by a statute of limitations, unless or until the defendant is willing to stipulate that he will waive the statute of limitations defense.

Shewbrooks v. A.C. and S. Inc., 529 So.2d 557, 562 (Miss. 1988)(citing supporting authority from fourteen other jurisdictions including Pennsylvania). To be "in accordance" with this aspect of the *forum non conveniens* doctrine, no change in the applicable law would be warranted following a Section 1404(a) transfer. The Reviser's Note, therefore, provides no support for the Respondent's contentions.

Instead, what meager legislative history there is supports this Court's conclusion in *Van Dusen v. Barrack*, 376 U.S. 612, 635 (1964), that Section 1404(a) "was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege." At the time Congress was considering the Judicial Code of 1948, which contained Section 1404(a), it was aware of problems arising from broad federal venue provisions, particularly those under the Federal Employers' Liability Act. *Id.*, 376 U.S. at 635. While the Judicial Code was pending, Congress considered and rejected the Jennings bill which would have drastically limited the forums available for cases under the Liability Act. *Id.*, 376 U.S. at 635. Thus,

Congress affirmatively expressed its intent to continue to provide plaintiffs with broad venue rights while ameliorating any resulting inconvenience or unfairness through the availability of Section 1404(a) transfers. Because of this legislative background and the statute's stated intent to have cases tried at locations called for by considerations of convenience and justice, this Court correctly concluded that Section 1404(a) should be regarded as a federal judicial housekeeping measure dealing only with the placement of litigation, and intended simply to authorize a change of courtrooms. *Id.*, 376 U.S. at 636-637. Consequently, no change in the applicable law is warranted when a case is transferred. *Id.*, 376 U.S. at 639.

The Respondent contends, however, that the result should be different with respect to plaintiff-initiated transfers[1] and expresses concern about litigants, with claims which are time-barred in the forum in which they arose, filing suits in distant jurisdictions whose sole recommendation as a forum is a favorable statute of limitations. Similarly, Amicus Curiae, Product Liability Advisory Council (hereinafter "PLAC"), devotes virtually

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[1] The Respondent implies that this Court's limitation of its *Van Dusen* holding to defendant-initiated transfers is support for a different result with respect to plaintiff-initiated transfers. This Court, however, does not decide questions which are not before it on certiorari. *See Mazer v. Stein*, 347 U.S. 201, 208 (1954); *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, 357 n.2 (1940). The question of the law to be applied following a plaintiff-initiated transfer was most definitely not before the Court in *Van Dusen*. This Court's reservation of judgment in *Van Dusen* with respect to this issue cannot, therefore, be construed as support for the Respondent's position.

its entire brief to expressing concern that anytime there is a procedural or choice of law advantage in a state in which a given defendant is subject to jurisdiction, plaintiffs will file suit there regardless of that state's lack of nexus or connection to the particular cause of action involved. It is important to recognize, however, that a plaintiff's ability to file suit in any particular forum and have that forum's law applied is not based upon, nor enhanced by, Section 1404(a). The concerns of the Respondent and PLAC in this regard only relate to the statutory and decisional laws of the various states which allow the filing of such lawsuits and provide for the application of the local forum's laws. Section 1404(a) has no impact upon these laws.

Section 1404(a) comes into play only if the plaintiff or the defendant seeks a transfer. Even then the application or non-application of the transferor state's law after a transfer will have no effect upon the continued ability of other plaintiffs to pursue claims in the transferor state. To the extent that a defendant feels there is unfairness to him in allowing a transfer with the continued application of the transferor state's law, he should raise an "interest of justice" objection to the motion for a change of venue, as urged by Amicus Curiae, Pfizer, Inc. (hereinafter "Pfizer"). However, a defendant's dissatisfaction with the wisdom of the transferor state's law is not a relevant consideration for determining whether the transferor state's law should be applied after a transfer.

II. Application Of The Law Of The Transferor State Following The Transfer Of A Case Upon The Motion Of A Plaintiff Is Not Contrary To The United States Constitution

The Respondent argues that it would be unconstitutional to interpret Section 1404(a) as permitting the application of the transferor state's law after a plaintiff-initiated transfer. The Respondent contends that the constitutional principles enunciated in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) require a federal district court hearing a diversity action to apply both the law and the statute of limitations which would have been applied by the courts of the forum state in which the federal court sits.

If this were so, these same principles would also require the application of the transferee state's law following defendant-initiated transfers. In *Van Dusen*, however, this Court held that the law of the transferor state must be applied following a defendant-initiated transfer. *Van Dusen v. Barrack*, 376 U.S. at 639. The Court had no difficulty in reconciling the *Erie* doctrine with its decision to apply the law of the transferor state.

> [O]ur interpretation of [Section 1404(a)] fully accords with and is supported by the policy underlying *Erie R. Co. v. Tompkins*, 304 U.S. 64. This Court has often formulated the *Erie* doctrine by . . . declaring that federal courts in diversity of citizenship cases are to apply the laws "of the states in which they sit," [citation omitted]. A superficial reading of these formulations might suggest that a transferee federal court should apply the law of the State in which it sits rather than the law of the transferor State. Such a reading, however, directly contradicts

the fundamental *Erie* doctrine which the quoted formulations were designed to express. . . . Applying [the Court's analysis in *Guaranty Trust*] to § 1404(a), we should ensure that the "accident" of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed. . . . What *Erie* and the cases following it have sought was an identity or uniformity between federal and state courts; and the fact that in most instances this could be achieved by directing federal courts to apply the laws of the States "in which they sit" should not obscure that, in applying the same reasoning to § 1404(a), the critical identity to be maintained is between the federal district court which decides the case and the courts of the State in which the action was filed. [footnotes omitted]

Van Dusen v. Barrack, 376 U.S. at 637-639.

The Respondent's contentions would only have merit if the *Erie* decision was founded upon a constitutional provision requiring all federal courts sitting in diversity to apply the law of the state in which the federal court was physically located. No such constitutional provision exists. In *Erie* this Court was concerned with federal district courts declaring substantive rules of common law applicable in a particular state without giving deference or consideration to the decisions of that state's highest court. The Court viewed such conduct as a usurpation of the powers reserved to the states by the United States Constitution.

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Erie R. Co. v. Tompkins, 304 U.S. at 78. Thus, the constitutional mandate upon which *Erie* is based is not that a federal court must apply the law of the state in which it is physically located. Rather, *Erie* is based upon the constitutional prohibition of a federal court's usurpation of the power of a particular state to declare its own law through the decisions of its highest court.

Requiring a transferee federal court to apply the law of the transferor state does no violence to this constitutional prohibition. The transferee court is not creating a federal general common law and declaring it to be the applicable law of the state in which the court is sitting. Because the transfer is, with respect to state law, nothing more than "a change of courtrooms", *see Van Dusen v. Barrack*, 376 U.S. at 639, the transferee federal district court is sitting as though it were a federal district court in the state where the lawsuit was originally filed. The transferee court will be applying the substantive law of the state where the lawsuit was filed, not some federal general common law. The transferee court's application of the transferor state's law will not be a declaration that the transferor state's law is the applicable law of the transferee state, but only a determination of the applicable law in the state where the lawsuit was filed. There is,

therefore, no usurpation of the forum state's power to declare its own laws. Furthermore, uniformity will be maintained between the results attainable in the transferee federal court and the state courts where the lawsuit was filed. Thus, in the present case, the Pennsylvania District Court's application of Mississippi law following a Section 1404(a) transfer will not contravene any of the constitutional principles enunciated in *Erie*.

Moreover, because the court will be applying Mississippi law, its application of Mississippi's statute of limitations, as expressly permitted in Mississippi pursuant to that state's decisional and statutory law, will not violate either the Due Process Clause or the Full Faith and Credit Clause of the United Suates Constitution. A state's application of its own statute of limitations to a cause of action which arose in another state, and may otherwise be governed by the laws of that other state, is not unconsitutional. *Sun Oil Co. v. Wortman*, ___U.S.___, 108 S.Ct. 2117, 2121 (1988). There is, therefore, no constitutional impediment to a transferee court's application of the transferor state's law following a Section 1404(a) transfer by either a defendant or a plaintiff.

III. The Writ Of Certiorari In This Case Should Not Be Dismissed As Improvidently Granted

Amicus Pfizer suggests that the writ of certiorari in this case should be dismissed as improvidently granted because this case is "an inadequate and inappropriate vehicle from which to derive a rule governing plaintiff-

initiated transfers under § 1404(a)." This case is an inappropriate vehicle only if the questions to be decided are those posited by Pfizer. Pfizer asks this Court to decide whether, in ruling on a plaintiff-made motion to transfer under Section 1404(a), the potential transferor court should consider factors beyond those considered with respect to defendant-made motions, and, if so, what additional factors should be considered. Because the Respondent failed to oppose the Petitioners' motion to transfer, Pfizer claims that this case is an inappropriate one in which to resolve these issues.

The issue before this Court, however, is not whether the Mississippi District Court gave due consideration to all of the proper factors when it granted the Petitioners' motion for a change of venue. Rather, the issue with respect to which a writ of certiorari was sought and granted is what state's law must be applied after there has been a plaintiff-initiated transfer from a court having proper venue and jurisdiction (*see* page i, *supra*). Pfizer's arguments with respect to what additional considerations should govern when a plaintiff is seeking a transfer pursuant to Section 1404(a) are simply irrelevant to a determination of the question presented for review in this case.[2] The law to be applied following a transfer is an

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[2] Contrary to Pfizer's assertions, it is not the Petitioners' position that because they filed their lawsuit in a proper forum they were entitled as of right to a transfer. The Petitioners were required to convince the Mississippi District Court that the convenience of the parties and witnesses, and the interest of justice, warranted a transfer. They did so, however; and the Respondent did not seek review of the resulting transfer order. The propriety of the transfer order is not before this Court. After the transfer, the Petitioners had a right to the application of Mississippi law, as Pfizer appears to concede.

immutable matter which is not dependent upon the merit, or lack thereof, of a plaintiff's motion for a change of venue. Although the law to be applied following a transfer is unquestionably a factor which may be considered by the potential transferor court, *see Van Dusen v. Barrack*, 376 U.S. at 643, the law to be applied will not change depending upon the strength or weakness of the other factors being weighed in determining whether to allow the transfer. Therefore, the "fait accompli" status of the transfer in this case when the issue of the applicable law arose does not make this an inappropriate case in which to decide that issue. The correctness of the transfer decision has no bearing on the resolution of the issue presented for review.

Moreover, the question presented for review is an important one concerning the construction and operation of a federal statute. The resolution of the question of the applicable law following a plaintiff-initiated transfer will have a significant impact on the functioning and administration of the federal court system and will resolve a dispute among the circuit courts of appeal. The writ of certiorari in this case was not improvidently granted and should not now be dismissed. Rather, this Court should resolve the important question posed by this case and establish uniformity in the federal court system by determining that the transferor state's law must be applied following a plaintiff-initiated transfer from a court having proper venue and jurisdiction.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the prior Brief For Petitioners, the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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